

EWTD for Surgical Trainees

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The British Orthopaedic
Trainees Association



ASiT The Association of
Surgeons in Training



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Introduction

The coming weeks and months will doubtless prove to be a difficult time for many surgical trainees as new rotas and working patterns are adopted, set against a backdrop of insufficient staff with which to fill these increasingly thin rotas.

*"If you can keep your head when all about you are losing theirs,
it's just possible you haven't grasped the situation."*

This document aims to provide a simplified, practical guide specific to surgical trainees, giving an overview of the relevant issues, answering some of the most common queries, and setting out EWTD and New Deal law as it currently stands

What this guide cannot do is give recommendations about what is right for *you*. A decision to opt out remains your choice. What is important is that you fully understand the risks and benefits of doing so – and equally of *not* doing so, and continuing to work or train beyond your allotted hours.

In preparing this document we have brought together the latest advice from a range of organisations, including the surgical Royal Colleges, the British Medical Association and NHS Employers. Where their advice is unclear we have sought to clarify this and the outcome of our correspondence forms the basis of this guide. Where ambiguity remains we have highlighted this.

ASiT and BOTA are not trade unions. Whether we should be is a discussion for another day, but in not currently being so we are restricted in the detailed advice we can offer surgical trainees.

If having read this guidance you remain in any doubt about these issues it is important that you seek further guidance. This may mean contacting relevant professional associations such as Remedy UK, the Hospital Consultants & Specialists Association or the BMA. Your indemnity organisation may also be able to offer you more specific advice.

The bottom-line is that you need to be pro-active to protect your own training while at the same time remaining professional and ensuring the safety of your patients.

You also need to be pro-active in making certain you are contractually safe and legally indemnified for the hours you choose to work and train. Make sure you cover yourself and always let your clinical leads and NHS Trust know what is happening.

We hope this guide provides clarity on the key issues surrounding EWTD and enables surgical trainees to remain, as always, one step ahead of the game.

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Background to the EWTD

"We got into this mess because a group of professional people, surgeons, have had their hours of work defined for them by others with little or no knowledge of the work concerned"

John Black, August 2009

This month has seen the implementation of the final stage of the European Working Time directive, ending the exemption for junior doctors that was originally established in 1993. This controversial piece of European legislation was aimed at protecting the health and safety of the worker. It initially excluded a number of defined groups, including doctors in training. Since this exemption was over-tuned in 2000, we have seen the introduction of an average 58-hour working week from 1 August 2004, 56-hours from August 2007 and now 48-hours.

The reduction in surgical training opportunities associated with EWTD implementation thus far is real and has been well documented, with numerous academic papers detailing the decline in operative exposure.

Surgical trainees remain opposed to this restriction of working hours for several reasons. As a craft speciality, surgery is particularly vulnerable to the inevitable reduction in training opportunities and experience that accompanies this. Patient safety will be jeopardised in the short-term through reduced rota cover, multiple handovers, and a lack of continuity in patient care. In the longer term, the reduction in training opportunities and inevitable focus on service will clearly impact on the clinical and operative experience of surgical trainees with an eventual deleterious effect on service delivery and patient outcomes.

Finally, we believe the assertion that EWTD is essential health and safety legislation is disingenuous given that the resulting shift work will result in more irregular hours and longer periods of on-call. This scenario is unlikely to result in well-rested doctors or the healthier work-life balance that some have sought to promote.

It is true to say the NHS and medical profession have had a many years to prepare for this. Surgical trainees have watched the Department of Health's implementation schedule closely during this time. ASiT first published a specific position statement outlining EWTD-related concerns in 2006. Since then, and despite numerous further warnings, we have seen no significant change in the provision of surgical training within the NHS in order to address these concerns; nor is there any evidence the NHS is planning to address these in the future.

Given that the introduction of any compensatory changes in training will now inevitably take several years to establish, we continue to call for the current legislation to be repealed in order that the patients of today and tomorrow get the first-class care they deserve.

In the meantime we need to remain constructive and work around current legislation to ensure training time is protected, while at the same time developing and promoting new training initiatives across the country.

EWTD and New Deal Rules

There is frequent confusion over the rules governing junior doctor's working hours.

There are two relevant areas of legislation:

1. Working Time Regulations (the UK implementation of the EWTD)
2. New Deal Contract (the junior doctor contract)

The current legislation limiting working hours, together with mandatory breaks and rest periods, are now formed by a combination of these.

Whilst the New Deal only applies to junior medical staff, the EWTD rules apply to all workers (including Consultants) across all sectors.

The New Deal Contract included the following key points:

- Working time should not exceed 56-hours of work per week.
- Actual duty hours depend on working pattern implemented (e.g. full, partial, etc)
- Eight consecutive hours rest between full shifts
- Natural breaks of 30-minutes per four-hours worked
- Minimum of 24-hours rest every 7-days, or 48-hours rest every 14-days.

EWTD regulations include the following key points:

- Working time not exceeding 48-hours per week, averaged over 26-week period.
- Eleven consecutive hours of rest per 24-hour period.
- Minimum of 24-hours rest every 7-days, or 48-hours rest every 14-days.
- Twenty minutes break per 6-consecutive hours worked.
- Four weeks paid annual leave.

Direct.gov: What counts as EWTD work?

As well as carrying out your normal duties, your working week includes:

- Job-related training.
- Job-related travelling time.
- Paid and some unpaid overtime.
- Time spent 'on-call' (note: non-resident on-call doctors only count the hours actually spent working as 'work').

If you work two jobs you could either:

- Consider signing an opt-out agreement with your employers if your total time worked is over 48 hours or reduce your hours to meet the 48-hour limit.

Direct.gov: What does not count as EWTD work?

Your working week does not include:

- Breaks when no work is done, such as lunch breaks.
- Normal travel to and from work.
- Time when you are 'on call' away from the workplace and not working (i.e. non-resident on-call).
- Travelling outside of normal working hours.
- Unpaid overtime that you have volunteered for, for example staying late to finish something off.
- Paid or unpaid holiday

EWTD and Personal 'Opt-Outs'

If you wish to, you may apply to opt-out of the EWTD working time limits. However, it is important to note:

- You cannot opt out of the EWTD or New Deal rest requirements
- Opting out does not exempt you from the 56-hour New Deal working time limit.

Opting out does not necessarily result in extra training time. You may find the extra hours worked are taken up by further service commitments. You will need to weigh up carefully whether these will further your clinical experience and training.

If you sign an opt-out you are free to cancel this agreement at any time by giving between one week and three months' notice to the Director of HR (the notice period depending on the wording of the opt-out agreement you have signed up to).

It is important that any opt-out you choose to pursue is of your own volition:

- Your employer cannot ask or pressurise you to opt out from EWTD limits.
- Opting out of EWTD limits must not be a requirement for your employment.

There is currently no nationally agreed system for opting out of EWTD working time limits in the NHS. Opting out must be agreed with your employer in writing.

Sample opt-out letters are available from a number of sources:

- Direct.gov Sample opt out agreement letter
http://www.direct.gov.uk/en/Employment/Employees/WorkingHoursAndTimeOff/DG_10029426
- BMA Sample opt out agreement letter
http://www.bma.org.uk/images/Junior_WTR_Optout_tcm41-189137.doc
- ASGBI: Opting out of the 48-hour working week
<http://asgbi.org.uk/download.cfm?docid=D37CD92E-0877-4389-BD56AC60590EF438>

We are also aware of a sample opt-out letter drafted by NHS Employers for use in the event of a pandemic flu epidemic causing substantial impact on NHS services.

- A copy of this letter can be viewed at the following link:
<http://www.nhsemployers.org/PlanningYourWorkforce/Pandemic-influenza/Pages/Working-time-regulation-opt-out-agreement.aspx>

Remuneration for Opting-Out

Any additional work undertaken after opting-out of EWTD limits should be remunerated by your employing organisation. How you are paid is open to local negotiation with your NHS Trust. However, *it is important to note that your pay banding will not necessarily change should you choose to opt out.*

This can be through paid hourly locum rates at least equal to the nationally agreed locum scale, or through the conventional banding system. The latter approach would require formal monitoring in order to establish appropriate remuneration, and is best suited to regular additional work as opposed to ad hoc shifts.

Current nationally agreed locum rates are detailed in the pay circulars listed in the reference section of this document.

EWTD and Medical Indemnity

Key points

- *Ensure your educational supervisor, clinical lead and NHS Trust know that you are working in excess of your 'allotted hours' for training purposes.*
- *Keep a record of any correspondence relating to this issue.*
- *Ask your NHS Trust for specific details of local indemnity arrangements.*
- *Please let us know if you are prevented by your NHS Trust from undertaking reasonable training outside your normal 'allotted' working hours.*

Trainees have rightly raised serious concerns regarding their medical indemnity for work undertaken over and above their 48-hour compliant rota. Given the propensity of hospital management to distance themselves from any adverse outcomes, trainees are right to be cautious and question what support, if any, the NHS will offer.

Two specific scenarios have been identified:

1. Where clinical workload necessitates staying beyond your allotted hours.
2. Where you attend for training in your own time outside your allotted hours.

The first scenario is likely to be indemnified. However, if this is a recurring scenario then it may be more appropriate for the employer to acknowledge this, re-design the rota, and re-band your post as appropriate.

The second scenario is less clear-cut. While in theory NHS indemnity should still apply, the caveat may be whether the employing organisation knows this 'work' is occurring, and whether the supervising Consultant is prepared to take clinical responsibility for this.

The NHS Litigation Authority has previously been asked to clarify this issue and released the following statement:

"Any activity carried out by clinicians which would be the subject of an indemnity if carried out during 'allotted' hours will be treated no differently under our schemes because that work was being done outside these hours".

*Stephen Walker, Chief Executive
NHS Litigation Authority, November 2007*

We asked the Medical Defence Union for their opinion and received the following response:

"...we would need to know in what capacity the surgeons in training are attending cases 'for their own education outside of the EWTD working hours'. If they are merely observing such cases and are not in any way providing clinical care but are just an observer, the question of indemnity would not arise. If, however, they are attending cases as part of the medical team providing care or treatment, we would expect that they are doing so as part of their employment and in that case they will be covered by NHS indemnity and there would be no need to inform the MDU. In the first instance we would advise any doctor who was working outside the EWTD hours to check with the NHS employer for whom he or she is contracted to work these additional hours what the indemnity arrangements are."

We asked the Medical Protection Society for their opinion and received the following response:

“Clarification has been sought which confirms that the NHSLA (National Health Service Litigation Authority) has reassured Doctors treating NHS patients beyond the limits of their contractual duties that they would be indemnified for claims by the NHSLA. However, it would be wise to discuss the views and options locally if working beyond contracted hours is not for service provision, but for educational purposes. Claims which arise from patients receiving NHS hospital care should therefore be covered by Trust indemnity. MPS would assist in matters which arise from clinical work undertaken outside of core contractual hours for non claims matters, such as GMC or disciplinary investigation.

From a risk management perspective junior doctors should consider the appropriateness of volunteering for extra work if they are tired, despite there being a good training opportunity. They must obviously ensure their own and the patients welfare as a priority. Ultimately, trainees are accountable for the decisions which they make, and they will be expected to always put the interest of the patient first.”

It is therefore clear that in the event of any adverse clinical incident occurring, a surgical trainee would be expected to have shown a professional regard for their rest periods, and not put a patient at risk as a result of their own tiredness.

Regardless of indemnity, in the second scenario a trainee may still find themselves in breach of their employment contract by undertaking these additional hours (see next section).

EWTD Non-Compliance

It is just as important that those wishing to adhere to a 48-hour compliant rota are able to do so.

Trainees concerned that their EWTD rota is in fact not 48-hour compliant over the reference period of 26-weeks should raise this issue with the Director of their Human Resources department and clinical leads.

If this concern is valid, the employer has a duty to then reduce working hours through rota amendments such that compliance is met.

A number of sanctions and penalties are available for NHS Trusts that fail to implement or knowingly run non-compliant rotas (excluding those for which derogation has been applied). These include:

- An improvement notice
- Prohibition notice
- Fine (£5000 per employee per week)
- Imprisonment of the responsible authority

EWTD and Employment Contracts

Key points

- *Check the wording of your contract before undertaking additional hours.*
- *Ensure your NHS Trust is aware of contractual barriers to you undertaking any additional work for either service provision or training.*
- *Keep a record of any correspondence on this issue.*

Trainees may find themselves in breach of their employment contract and/or terms and conditions of service by undertaking additional hours over and above those included in their EWTD-compliant rota.

This is dependant on the definition of 'work' as applied to surgical training and this (as far as we are aware) has not yet been legally defined *in this scenario*. It will also depend on the exact wording of your contract, which may differ widely from hospital to hospital.

It is therefore vital that trainees wishing to undertake either paid locum work, or additional training beyond their contracted hours are aware of the specific wording of their contract.

Typical contractual statements preventing such work may be worded as follows:

"You agree not to undertake locum medical or dental work for this or any other employer where such work would cause your contractual hours (or actual hours of work) to breach the controls set out in paragraph 20 of the Terms and Conditions of Service."

"Your hours and duties are as defined in the attached job description [for rotations, the job description may differ for each individual post/placement]. You will be available for duty hours which in total will not exceed the duty hours set out for your working pattern in Paragraph 20 of the Terms and Conditions of Service."

In a worst-case-scenario breach of these contractual obligations may be considered grounds for dismissal. At the very least it is likely your NHS Trust will seek to use this in their defence should any adverse incident occur during hours worked over-and-above your contractual obligations.

We are aware of some NHS Trusts who, despite including these clauses in their employment contracts, are then asking medical staff to work additional hours to fill rota-gaps. Such incongruities should be highlighted to the employing NHS Trust.

What Can Trainees Do Now To Protect Training?

Key points

- *You must be pro-active in protecting and maximising your own training time!*

- Record when training occurs out of hours.
We are working to ensure that this becomes an option in training logbooks
- Ensure your current rota and banding adequately reflects the work you are undertaking.
- Any new rota should be appropriate to the work required and be agreed in consultation with your Consultants.
- Make sure training opportunities are protected in any revisions of your rota and alert your Consultants, educational supervisors, programme directors and NHS Trust if this is not the case.
- Maximise study-leave for the benefit of your training.
- Please respond to the EWTD surgical survey that surgical trainee groups, in combination with the RCSEng, will be distributing at the start of September.
- Remember: *keep records of your correspondence on any of these issues.*

References and Further Reading

- ASiT EWTD Position Statement - January 2009
http://www.asit.org/assets/documents/ASiT_EWTD_Position_Statement.pdf
- BOTA Position Statement on the European Working Time Directive and Training in Trauma & Orthopaedic Surgery - January 2009
<http://www.bota.org.uk/uploads/cms/00178/BOTA%20EWTD%20Statement.pdf>
- BMA European Working Time Directive briefing paper (31 July 2009)
http://www.bma.org.uk/employmentandcontracts/working_arrangements/hours/euroworktim.jsp
- EWTD briefing paper from the BMA Junior Doctors Committee: facing the challenges of the EWTD
http://www.bma.org.uk/employmentandcontracts/working_arrangements/hours/euroworktim.jsp
- HSG (96)48: NHS indemnity arrangements for handling clinical negligence claims against NHS staff
http://www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Healthserviceguidelines/DH_4018270
- England & Wales Pay Circular: (M&D) 1/2009
http://www.nhsemployers.org/Aboutus/Publications/PayCirculars/Documents/Pay%20Circular_MD_1_09_090409.pdf
- Scotland Pay Circular: PCS(DD)2009/03
[http://www.sehd.scot.nhs.uk/pcs/PCS2009\(DD\)03.pdf](http://www.sehd.scot.nhs.uk/pcs/PCS2009(DD)03.pdf)
- Northern Ireland Pay Circular: HSS TC8 1/2009
<http://www.dhsspsni.gov.uk/pay-circular-2009-2011.pdf>
- BMA JDC Guide to calculating rota banding, rules governing rotas, etc
http://www.bma.org.uk/images/FinalCountdown_tcm41-158037.pdf
- ASGBI: The Impact of EWTD on Delivery of Surgical Services: A Consensus Statement
<http://asgbi.org.uk/download.cfm?docid=F3FAB184-01E1-414A-BA7C0CE07BBEDD7F>
- ASGBI: Coming to terms with the Working Time Regulations
<http://asgbi.org.uk/download.cfm?docid=E8AB16C6-CF3D-416B-A4CE7D74D698E6C5>
- RCSEng President's Newsletter - August 2009
http://www.rcseng.ac.uk/about/president/current_newsletter.html
- RCSEng: The Working Time Directive 2009: Meeting the challenge in surgery
http://www.rcseng.ac.uk/service_delivery/documents/WTD%202009%20Meeting%20the%20challenge%20in%20surgery.pdf
- RCSEng: Safe Shift Working for Surgeons in Training
http://www.rcseng.ac.uk/publications/docs/Shift_working_for_surgeons_in_training.html
- The Royal College of Surgeons of England / Royal College of Anaesthetists Working Time Directive 2009 Project report: WTD - Implications and Practical Solutions to Achieve Compliance
http://www.rcseng.ac.uk/service_delivery/working-time-directive/docs/RCS-RCoA%20WTD%20Project%20Report.pdf

Further Reading

- RCSEng EWTD Resources
http://www.rcseng.ac.uk/service_delivery/working-time-directive
- ASGBI EWTD Resources
http://asgbi.org.uk/en/publications/working_time_regulations.cfm
- Healthcare Workforce EWTD Resources
<http://www.healthcareworkforce.nhs.uk/workingtimedirective.html>
- NHS Employers Working Time Directive Resources - Frequently Asked Questions for Trust implementation teams
http://www.nhsemployers.org/SiteCollectionDocuments/WTD_FAQs_010609.pdf
- Open Europe: TIME'S UP! The case against the EU's 48 hour working week
<http://asgbi.org.uk/download.cfm?docid=0A0DC209-DA70-4E0E-88B9C6B1EAAC441B>